



Atty Gen. Op. No. 10 - 1807

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August 9, 2010

Perry F. Goldlust, Esquire
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**RE: Freedom of Information Act Complaint
Against City of Wilmington**

Dear Mr. Goldlust:

On July 1, 2010, the Delaware Department of Justice (DDOJ) received your June 30, 2010 letter alleging the City of Wilmington ("City") had violated the Freedom of Information Act, 29 *Del. C.* ch. 100 (FOIA), in refusing to provide you with public records. On July 2, 2010, we sent your complaint to the City, and asked for their response by July 12, 2010. The City requested and received an extension until July 16, 2010, and we received their timely response on July 15, 2010. We then sought additional information from the City. This is the DDOJ determination of your complaint, pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

As attorney for ASFCME Council 81, Locals 320 and 1102 ("Union") you requested the following records from the City:

1. The "JAQ report," a comparable wage study.

2. Documentation involving the hiring of outside counsel for prior contract negotiations with the Union.

The City denied your request on the grounds that the City and the Union are engaged in collective bargaining, so that the requested records are not public records, pursuant to 29 *Del. C.* § 10002(g)(8) (exempting records “involving labor negotiations or collective bargaining.”). You claim that “collective bargaining is not currently under way,” while the City claims that it is, because the Union has formally asked the City to begin negotiations, and the parties have already met at the negotiating table and are scheduled to meet again in “the near future.”

RELEVANT STATUTES

The Delaware Freedom of Information Act was enacted to ensure that “citizens have easy access to public records in order that the society remain free and democratic.”¹ 29 *Del. C.* § 10001. FOIA requires that the public must have “reasonable access to” public records for “inspection and copying.” 29 *Del. C.* § 10003(a). FOIA excludes from the definition of “public record” “[a]ny records involving labor negotiations or collective bargaining,” 29 *Del. C.* § 10002(g)(8).

Labor disputes in the public sector are submitted to the Public Employment Relations Board (“PERB”), pursuant to the Public Employment Relations Act (“PERA”), 19 *Del. C.* ch. 13. PERA was enacted “to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by

¹ While FOIA refers throughout to “citizens,” restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006). Therefore, we will use the term “public” rather than “citizens.”

assuring the orderly and uninterrupted operations and functions of the public employer.”

13 *Del. C.* § 1301. To accomplish those purposes, PERA assigned to PERB the responsibility to “assist in resolving disputes between public employees and public employers” 13 *Del. C.* § 1301(3). PERB has the power and the duty “to prevent any unfair labor practice . . . and to issue appropriate remedial orders.” 19 *Del. C.* § 1308(a). It is an unfair labor practice for a public employer to “[r]efuse to disclose any public record as defined by Chapter 100 of Title 29.” 19 *Del. C.* § 1307(a)(8).

DISCUSSION

1. The request for the “JAQ” report.

This request directly raises the relationship between PERA and FOIA: the former requiring a public employer to disclose public records to the unions, the latter excluding from the definition of public record any document “involving” collective bargaining. If a record is involved in collective bargaining, it is not a public record, pursuant to 29 *Del. C.* § 10002(g)(8), and therefore failure to produce it is not an unfair labor practice, pursuant to 19 *Del. C.* § 1307(a)(8). If the exception to FOIA is read expansively, any record that a union requests of a public employer in connection with the collective bargaining process is unobtainable. Yet, the employer’s duty to provide information to the union is central to meaningful collective bargaining. 1 *The Developing Labor Law* 929 (John E. Higgins, Jr. ed., 2006). “The duty to bargain collectively. . . includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative.” *Detroit Edison Co. v. N.L.R.B.*, 40 U.S. 301, 303 (1979). The General Assembly’s clear intent in making failure to produce public

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records an unfair labor practice was to require public employers to produce to unions all information needed for effective collective bargaining.

We cannot simply ignore the plain language of either one of the statutes in apparent conflict, but are required to reconcile them. *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). Yet, it is not the statutory role of the Attorney General's office to determine the parties' relationships under collective bargaining. It is our role only to give an opinion as to what FOIA means, whereas the General Assembly has designated PERB to resolve labor law issues. It is the express purpose of PERA and PERB to,

promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

...
(3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

19 Del. C. § 1301; *see also* 19 Del. C. §§ 1307 (unfair labor practices) and 1308 (disposition of complaints).

In our opinion FOIA is co-extensive with the duty under PERA to provide information. Therefore, §10002(g)(8) excludes from the definition of public record only records that could be excluded from the duty to provide information in collective bargaining. That is a question of labor law to be determined by PERB. Indeed, we have no procedure for the necessary fact-finding, whereas PERB, which is comprised of

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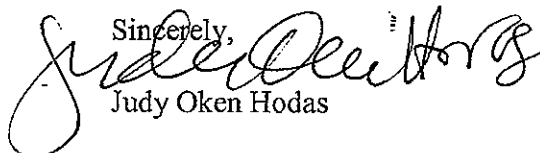
individuals who are "knowledgeable in the area of labor relations," can subpoena witness and records and hold hearings. 14 Del. C. § 4006. Moreover, should we attempt to make a factual finding in this case, we would be creating a parallel body of decisions to the PERB, which is not conducive to orderly labor relations, and which would encourage forum shopping.

2. The request for records concerning outside counsel.

As we have previously determined, records relating to a public body's expenditure of public funds are "clearly of a public nature[.]" *Op. Att'y Gen. 10-IB06*, at 6 (Del. July 15, 2010). Given the substantial public interest in how public bodies spend the public's money, records concerning expenditures should be disclosed. Otherwise, all FOIA requests concerning expenditures could be denied as arguably related to collective bargaining. Therefore the records requested concerning expenditures for outside counsel should be produced. However, the City does not have to make available any information that is privileged under 29 *Del. C.* §§ 10002(g).

CONCLUSION

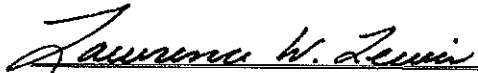
We conclude that records of expenditures for outside counsel must promptly be produced, subject to the exemptions for attorney-client or other privileged information. However, because of the desirability of there being a consistent body of Delaware labor law, we defer to PERB to determine whether the JAQ report must be disclosed, pursuant to PERA.

Sincerely,

Judy Oken Hodas

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Deputy Attorney General

Approved:


Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator
Martin C. Meltzer, Esquire